BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

COLLEEN AUDIS, Claimant, v. BASIC AMERICAN FOODS, Employer, and LUMBERMAN'S MUTUAL CASUALTY COMPANY, Surety, Defendants.	)	**IC 97-019009** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed December 14, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission initially assigned the above-entitled matter to Referee Lora Rainey Breen, who conducted a hearing in Idaho Falls, Idaho, on June 17, 2003, (the first hearing). Claimant was present and represented by G. Rich Andrus of Rexburg. Eric S. Bailey of Boise represented Defendants. Referee Breen was subsequently deployed by the military and this matter was re-assigned to Referee Michael E. Powers, who conducted another hearing in Idaho Falls on September 1, 2004, (the second hearing). Documentary and oral evidence were presented at the first hearing and Claimant testified at the second hearing. The record remained open for the taking of post-hearing depositions and the submission of post-hearing briefs. The matter came under advisement on November 15, 2004, and is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided as a result of the hearings are:

1. Whether Claimant is entitled to medical care for her cervical condition;

2. Whether sanctions are warranted for Claimant's failure to provide notice of treatment pursuant to Idaho Code § 72-432(4)(a) and (5); and,

3. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

Claimant did not argue the attorney fees issue in his post-hearing briefing and that issue is deemed waived.

CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to medical care in the form of a cervical fusion as the result of a 1997 industrial accident.

Defendants contend that the only injury Claimant sustained in the admitted industrial accident was a fractured sternum that has long since resolved. While Claimant may currently be experiencing cervical problems, the fact that she did not report any neck pain until months after her accident and the fact that she has rather severe pre-existing cervical degeneration, provide ample reasons for denying her claim. Further, she has presented no medical testimony relating her cervical condition or the need for surgery to her accident. Defendants also argue that certain physician's bills for services should not be their responsibility because Claimant did not follow the proper chain of referral mechanism provided for in Idaho Code § 72-432.

Claimant responds that if the medical records and physician deposition testimony are viewed in conjunction with the liberal construction doctrine afforded workers' compensation cases, she has met her burden of proof regarding causation.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and her daughter, Geraldine Walker, presented at the first hearing;

2. Claimant's Exhibits 1-33 admitted at the first hearing;

3. Defendants' Exhibits 1-16 admitted at the first hearing;

4. The testimony of Claimant presented at the second hearing; and

5. The post-hearing depositions of: Gerald Moress, M.D., with Exhibits 1-3 taken by Defendants on July 23, 2003; Gary C. Walker, M.D., with Exhibits 1-2, Eric Walker, M.D., and David C. Simon, M.D., with Exhibits 1-5 all taken by Defendants on September 24, 2003; and Lynn J. Stromberg, M.D., with Exhibit A taken by Claimant on May 25, 2004.

All objections made during the course of the taking of the above-referenced depositions are overruled with the exception of Claimant's objection at page eight of Dr. Moress' deposition and Defendants' objection at page 54 of Dr. Gary Walker's deposition which are sustained.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 60 years of age at the time of the second hearing. She worked as a laborer and potato sorter for Employer. On May 31, 1997, while attempting to empty a wheelbarrow full of potatoes, the wheelbarrow fell back on her and either the rim of the wheelbarrow between the handles, or one of the handles themselves, struck her in the chest causing her to fall backward.

2. Claimant presented to Madison Memorial Hospital in Rexburg the following day where an x-ray was taken that revealed a fracture of the anterior cortex of the sternum with a one-millimeter depression. No cervical complaints were noted.

3. Claimant presented to Cory Rammell, M.D., on June 4, 1997, as a follow-up from her emergency room visit on June 1. Her neck was noted to be supple. No cervical complaints were noted.

4. Claimant returned to Dr. Rammell on June 9. He noted that Claimant was complaining of paraspinal pain. No cervical complaints were noted.

5. Claimant continued to see Dr. Rammell until he referred her to David Simon, M.D., a physiatrist, on July 23, 1997. Dr. Rammell recorded no cervical complaints during the course of his treatment of Claimant.

6. Claimant first saw Dr. Simon on July 28, 1997. Dr. Simon noted Claimant's complaints of chest pain and, "More recently, she has developed some pain in her mid-back as well." Claimant's Exhibit 2. He further noted: "There is [*sic*] no contusions along the thoracic or cervical spine. There is only mild tenderness to palpation in the left thoracic paraspinal area." *Id*. No cervical complaints were noted.

7. Claimant next saw Dr. Simon on August 6, 1997, and noted she continued to have tenderness along the sternum. He ordered a CT scan of the sternum to evaluate for nonunion. No cervical complaints were noted.

8. Claimant next saw Dr. Simon on August 13 to review the results of the CT scan that showed some healing of the sternum fracture. He noted that Claimant's trapezius muscles were slightly tender but there was no abnormal finding with her right upper extremity. No cervical complaints were noted.

9. Claimant again saw Dr. Simon on September 12 and again, no cervical complaints were noted.

10. On September 24, 1997, Claimant saw Gary C. Walker, M.D., a physiatrist, at Defendants' request. She informed Dr. Walker that she had neck and thoracic pain. This is the

first time any neck complaints are noted in the medical records in evidence. Dr. Walker recorded that Claimant was tender in the cervical paraspinal muscles on palpation.

11. Claimant last saw Dr. Simon on October 3, 1997. He determined that there was nothing more he had to offer her. No cervical complaints were noted.

12. Claimant is a poor historian.

DISCUSSION AND FURTHER FINDINGS

Causation:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See,* Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. Paulson v. Idaho Forest Industries, Inc., 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." Jones v. Emmett Manor, 134 Idaho 160, 997 P.2d 621 (2000).

13. On May 9, 2002, Claimant saw Lynn J. Stromberg, M.D., an orthopedic surgeon for an evaluation of her cervical problems. Dr. Stromberg noted per history that Claimant injured her sternum in her accident and had also had persistent pain between her shoulders since

the accident. He reviewed some plain cervical x-rays that revealed severe degenerative disc disease at C5-6 and C6-7. He ordered a cervical MRI that was accomplished on September 16, 2002. It revealed: "Multilevel degenerative disc disease and uncovertebral degenerative joint disease with resulting central canal stenosis at C3-4, C4-5, C5-6, C6-7 as described. There is also neuroforaminal stenosis at these levels." Claimant's Exhibit 7. Dr. Stromberg noted that the pathology of the cervical spine is likely the cause of Claimant's cervical radicular pain in her arm as well as her parascapular pain. He is recommending a C4-C7 fusion.

14. Claimant took Dr. Stromberg's deposition on May 25, 2004. Dr. Stromberg appeared at the deposition with his attorney. For reasons not clear from the record, Dr. Stromberg's attorney would not let him answer any questions requiring any expert opinions; he would only let him answer questions regarding his evaluation and/or treatment of Claimant from a factual standpoint. Contrary to Claimant's assertion at page eight of her post-hearing brief that Dr. Stromberg attributed Claimant's symptoms to her "injury," he actually attributed her symptoms to her severe degenerative cervical disc disease. Further, Dr. Stromberg's attorney prevented him from rendering an opinion regarding whether Claimant's cervical condition or the alleged need for surgery is causally related to her industrial accident.

15. Defendants took Dr. Simon's deposition on September 24, 2003. Dr. Simon is the physician to whom Claimant was referred by Dr. Rammell and first saw Claimant on July 28, 1997, about two months post-accident. Dr. Simon testified that Claimant never mentioned neck pain to him. He testified as follows regarding causation:

> Q. (By Mr. Bailey): Do you have any opinions as you sit here today having reviewed the information that you've already explained to us as to whether the cervical conditions alleged by Ms. Audis are causally connected to the industrial accident of May 31, 1997 as described to you?
>
> A. Well, I haven't seen exactly what she's – what her cervical condition is, but based on my evaluations of her after the injury there were no reports of any neck injury or neck symptoms. And so I don't see how there could

have been a neck injury from that when I treated her for four months after without any complaints.

Dr. Simon Deposition, pp. 20-21.

16. Defendants took Dr. Gary Walker's deposition on September 24, 2003. Dr. Walker is the physiatrist who performed an IME on September 24, 1997, about three months after Claimant's accident. At the time of his evaluation, Dr. Walker reviewed the chest x-rays taken at the emergency room the day after Claimant's accident. He testified that the osteophytes and disc space narrowing that could be seen at the bottom of the cervical spine on the x-rays were definitely pre-existing and could be the source of Claimant's complaints and:

> "A sternal fracture would absolutely have no relationship at all to arm or neck symptoms. Physiologically it's an impossibility. There is no anatomic way that a sternal fracture could cause symptoms in the arms.
>
> Arm symptoms come from the neck, and in this case, she had on this X-ray findings of preexisting cervical changes in the lower cervical spine. That certainly could cause radicular symptoms into the arms."

Dr. Gary Walker Deposition, pp. 17-18.

17. Defendants took the deposition of Dr. Eric Walker (Dr. Gary Walker's brother) on September 24, 2003. Dr. Eric Walker is the physiatrist who first saw Claimant on November 11, 2000, over three years post-accident. Dr. Walker was not quite sure how Claimant came to see him but testified it was not for an IME. Dr. Walker opined as follows regarding causation:

> Q. (By Mr. Bailey): Do you have an opinion on a more probable than not basis as to whether the industrial accident of May 31, 1997 would have accelerated or lit up the preexisting degenerative cervical disease and this opinion based upon your examination of her and your review of the medical records?
>
> A. Usually I would say I think it could have. Certainly a fall with underlying degenerative changes could aggravate that. I think it unlikely that there was a significant acceleration of the degenerative process where that was not the primary complaint initially. I think over time that became a more prominent symptom it sounds like.
>
> Q. So the lack of contemporaneous complaints causes you to not establish that causation connection; is that accurate?

A. It would be difficult for me to state more probably than not.

. . .

Q. (By Mr. Bailey): As you sit here today and based upon the questions that have been presented by both myself and Mr. Andrus, do you believe on a more probable than not basis that Mrs. Audis suffered a traumatic injury to her cervical spine as a result of an industrial accident of May 31, 1997?

A. I don't think there was any structural damage in this incident. Was there some incidental trauma I'll call it which I've defined in there as a strain? I think it's not an unusual thing. That may well have occurred. I don't have any good evidence to suggest that was reported until down the road when that was first mentioned. I think it's reasonable that may well have occurred, but it's tough for me to say that it did. It's more probable than not that there was no significant trauma, however, and that should have resolved over the course of time and not be a primary cause of symptoms at this point in time.

Dr. Eric Walker Deposition, pp. 31-32, 76-77.

18. Defendants took the deposition of Gerald Moress, M.D., a neurologist who saw Claimant at their request on May 31, 2003, exactly six years post-accident. He testified as follows regarding causation:

Q. (By Mr. Bailey): Do you have an opinion on a more probable than not basis whether any such cervical impairment would be apportionable to the industrial accident?

A. I would not apportion anything to the industrial accident.

Q. Can you tell us why?

A. The reason I would not would be because, number one, there is no evidence at the time of the industrial injury we're talking about temporally that there were any symptoms regarding her neck until later on. And even then, those symptoms were not significant initially. And I believe she's had for [*sic* – full] range of motion initially from some of the treating physicians and therapists. I just don't see anything that occurred close enough in time to the accident to make me feel there is a causation for her complaints in the accident, per se.

Dr. Morress Deposition, pp. 17-18.

19. Claimant argues that she complained of neck pain from the time of her accident based on her testimony, that of her daughter, and the reference to "paraspinal pain" in Dr. Rammell's June 9, 1997, handwritten office note. Claimant's argument is not persuasive.

Claimant's testimony that she told her initial treating physicians about her neck pain is undermined by the lack of documentation in that regard in the medical records until Dr. Simon's note of September 24, 1997. It has been this Referee's experience that physicians are generally quite diligent in noting their patients' complaints. Claimant argues that because she only has a 7th grade education, she is somehow excused from accurately pinpointing the area of her body causing her pain and means to refer to her neck when she refers to her back. However, she could certainly point to her neck area if that was causing her concern. Further, throughout the course of her lengthy treatment, she had no difficulty describing in detail her various complaints. Her daughter's testimony is also not convincing. When asked how she knew Claimant injured her neck at the time of the accident, she responded, "Because she told me she couldn't sit up, she had to lay down." First Hearing Transcript, p. 74.

The Referee is aware that complaints of pain following an accident do not necessarily have to be contained within medical records to be given any weight. This case is similar to Duncan v. Navajo Express, Inc., 96 IWCD 9629 (1996) *affirmed* Duncan v. Navajo Trucking, 134 Idaho 202, 998 P.2d 1115 (2000). In that case, this Referee represented the claimant and defense counsel herein represented the defendants. The issue was whether the claimant also injured his low back in an accident wherein he injured his knee and the knee claim was accepted. The defense argued, and the claimant's treating physician agreed, that the failure to complain to a physician about his back pain until a swimming incident six weeks later significantly aggravated claimant's back condition provided the basis for the finding of a lack of causation. However, the treating physician agreed at his deposition that if the claimant made complaints of leg or hip pain to others nearer to the time of his industrial accident that the Commission found to be credible, he would change his causation opinion. The claimant and his significant other testified at hearing that claimant complained of leg and hip pain before the swimming incident

and the Referee found the testimony credible and causation was established. Here, the evidence of more contemporaneous complaints of neck pain is sparse, self-serving, and not credible. For instance, Claimant testified for the first (and only) time at the second hearing as follows:

> Q. (By Mr. Andrus): When did you first feel any pain in your neck?
>
> A. Right after I was injured. I was going home from the job, trying to get home; and my neck got turned sideways. Now, I don't know if it was left or right. But it got turned, and it got stuck there. And when I got off the road, I turned around and asked – had my brother called to come and get me.

Second Hearing Transcript, p. 5.

If the above description of events had actually occurred, the Referee is hard-pressed to understand why Claimant would not have mentioned anything about it until the second hearing over seven years post-accident. It is also difficult to understand why Dr. Rammell found Claimant's neck to be "supple" on June 4, 1997, and again on June 30 and July 14.

Regarding the "paraspinal pain" notation, Dr. Simon testified that that term was referring to the paraspinal muscles that run the entire length of the spine; cervical, thoracic, and lumbar. Dr. Rammell was not deposed or otherwise asked to explain what he meant by the term "paraspinal pain" and to attribute that single notation to a complaint of neck pain is simply too big of a stretch.

Claimant also argues that she should be afforded the benefit of the liberal construction doctrine. However, the liberal construction doctrine refers to the workers' compensation law – not facts. See, *e.g.*, Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). Even if the law is to be liberally construed, Claimant is not relieved of her burden of proving by medical evidence to a reasonable degree of medical probability that the condition for which she seeks benefits is causally related to an accident arising out of and in the course of her employment. This Claimant has failed to do.

Notice of treatment:

20. Defendants contend that because Claimant did not follow the procedures regarding changing physicians as set forth in Idaho Code § 72-432(4)(a) and (5) and Rule 20, JRP, she is not entitled to payment of or reimbursement for any evaluation and/or treatment provided by Kent Jones, M.D., John Macfarlane, M.D., and Lynn Stromberg, M.D. Claimant did not address this contention in either her opening or reply brief. Claimant testified as follows at the first hearing regarding how she became involved with these physicians:

> Q. (By Mr. Bailey): How did you make your way down to Dr. Macfarlane?
>
> A. I had my sister-in-law take me.
>
> . . .
>
> Q. Why did you go there, how did you pick him out? That's what I want to know.
>
> A. I got him from, referred by another doctor in Salt Lake City.
>
> Q. And who was that?
>
> A. Jones, Kent Jones is the one who referred me to him.
>
> Q. And my understanding from looking at Kent Jones' medical records is you self-referred to him. How did you pick out Kent Jones?
>
> A. He was my brother's doctor.
>
> Q. At no point in time prior to your first visit with Kent Jones did you ever request authority from the insurance company to see him, did you?
>
> A. No.
>
> Q. And the same with Dr. Macfarlane.
>
> A. No.
>
> Q. And the same with Dr. Stromberg.
>
> A. That's true.

First Hearing Transcript, pp. 61-62.

21. The Referee finds that Defendants are not liable for the payment of or reimbursement for the evaluations and/or treatment provided by Drs. Jones, Macfarlane, and Stromberg.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that the cervical condition for which she seeks treatment is causally connected to her May 31, 1997, industrial accident.

2. Claimant is not entitled to payment of or reimbursement for the evaluations and/or care provided by Drs. Jones, Macfarlane, and Stromberg.

RECOMMENDATIONS

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __14th ___ day of ___December_____, 2004.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Legal Associate

CERTIFICATE OF SERVICE

I hereby certify that on the __14th ___ day of __December__, 2004, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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